Dining with the Dogs: Reflections on the Criticism of Judges

HON. MICHAEL DALY HAWKINS*

I. INTRODUCTION

Judges may represent the least dangerous branch of government, but you would not know it from the level of disdain recently aimed at them. Criticism of judges even found its way into the 1996 Presidential Campaign, not over a constitutional issue of great moment, but over the decision of an individual federal trial judge to suppress the results of a drug search. The incident, out of which no one came looking particularly good, is an interesting case study of how quickly a seemingly routine decision can find itself embroiled in controversy.

How did the fuse of public controversy become so quickly lit? First of all, it happened in New York where the media seems to love a good controversy and where criticism of public officials is an advanced art form. United States District Judge Harold Baer, a former prosecutor, made some remarks he would later withdraw about the police department. The remarks —centering around whether it might be reasonable for a citizen to run in the other direction when the police approach—were interesting enough to find their way onto the pages of several national newspapers. The controversy was up and running.

The case received full national attention when the President's Press Secretary was asked about the case at a regular news briefing for the media. The Press Secretary announced that the White House disagreed with Judge Baer's decision and had asked the Department of Justice and the local United States Attorney to seek reconsideration of Judge Baer's decision. The incident might have died right there, but the Press Secretary, in response to a follow-up question, stated that if Judge Baer did not change his decision, the White House had not ruled out asking the judge (a recent appointee of the President) to resign.[1]

---

* Circuit Judge, United States Court of Appeals for the Ninth Circuit. The author is grateful for the helpful advice and comments of Professor Charles McCurdy of the University of Virginia.

[1] *See* Alison Mitchell, *Clinton Pressing Judge to Resign*, N.Y. TIMES, Mar. 22, 1996, at A5. It should be noted that the President himself never took this position and the White House Counsel later stated that the White House believed that "the proper way for the executive branch to contest judicial decisions with which it disagrees is to challenge them in the courts." *Partisan Judge-Bashing*, N.Y. TIMES, Mar. 23, 1996 at A1 (remarks attributed to Jack Quinn).

The controversy was now at a full gallop. Not to be outdone, the presumed nominee of the opposition party (and, at the time, Majority leader of the United States Senate) commented that resignation was an insufficiently severe remedy. Judge Baer, he argued, should be impeached.[2] The reaction in the judicial community, especially among federal judges, was one of quiet amazement, even shock. Many felt that the tone of the debate was out of hand and out of bounds. Echoing the feelings of many of their colleagues across the nation, several Judges of the United States Court of Appeals for the Second Circuit, in a rare public statement, issued a strong condemnation. It is one thing, they pointed out, to disagree with a judge's decision; it is quite another to say that a judge ought to be removed from office for simply having rendered a decision with which someone disagrees.[3]

The Judge Baer episode may reflect the times. Not only did it gain public attention during a national political campaign, but it also happened at a time of renewed interest in and criticism of the criminal justice system. As this is written, the episode is, thankfully, yesterday's news. Painful though it may have been, the episode raises provocative questions about the criticism of judges, the proper role of the judiciary in responding to criticism and, in a larger sense, what we should make of such criticism in general.

Retired Judge H. Lee Sarokin had one answer. A federal district judge recently elevated to the Third Circuit, Judge Sarokin simply quit the bench. Resigning his lifetime job, he cited the increasing injection of politics into the judicial process as his principal reason for leaving.[4] That is certainly one way of responding. Judge Guido Calabresi of the Second Circuit takes a very different, but equally direct approach. In a recent talk given to state and federal judges, Judge Calabresi had a simple description of what an Article III judge should do when subjected to criticism: absolutely nothing; silence is the price of life tenure.[5]

---

[2] *See* Katharine Q. Seelye, *Dole Tours Death Chamber in San Quentin and Calls for Speedier Executions*, N.Y. TIMES, Mar. 24, 1996, at §1, p. 1. (quoting Robert Dole (R-Kansas) as saying, "He ought to be impeached instead of reprimanded.").

[3] Statement of Judges Jon O. Newman, Jr., J. Edward Lumbard, Wilfred Feinberg, and James L. Oakes (Mar. 28, 1996) (the current and former Chief Judges of the U.S. Court of Appeals for the Second Circuit).

[4] *See* Jan Hoffman, *Politicians Take Another Judge to Task*, N.Y. TIMES, June 8, 1996, at A16.

[5] Judge Guido Calabresi, Seminar Remarks entitled: "The Community of Courts: The Compleat Appellate Judge," co-sponsored by the State Justice Institute, the Appellate Judges Conference of the American Bar Association, and the Federal Judicial Center (Mar. 28–31, 1996).

The criticism of judges probably began the moment that judges first issued decisions that occupants of other branches found disagreeable. There was certainly a time when a decision the sovereign found disagreeable could mean the loss of your head. We seem to have progressed beyond that. But is the current level of criticism of judges at some new and alarming decibel level or is it merely reflective of our constitutional system letting off some entirely appropriate steam? To gain some perspective, it might be helpful to pause and reflect on judicial criticism over the years.

The completely unscientific survey that follows relies heavily on examples of criticism of federal judges. Perhaps because of their protected status and their general disinclination to respond to criticism, federal judges seem often to be inviting targets, especially of politicians. Because they are appointed, they have little or no built-in constituency to defend their actions; so a politician who might think twice about criticizing the local justice of the peace will not hesitate before taking on a Supreme Court Justice. Finally, because federal judges often deal with issues in which there is some level of national interest, there exists a rich documentary record to review.

Let us turn to that history and see what it tells us about the current state of affairs with respect to the criticism of judges and the decisions they render.

II. JOHN MARSHALL AND HIS CRITICS

John Marshall is, by the measure of most historians of the Supreme Court, the greatest Chief Justice in our history.[6] Yet, in his day, Marshall was the object of bitter criticism over his Court's opinions, opinions today taken virtually for granted.

In what is surely one of the most important decisions in constitutional history, *Marbury v. Madison*,[7] Marshall articulated the principle of judicial review—the authority of the Supreme Court to review the actions of the other branches of government.[8] Marshall argued that some institution had to be the final arbiter of disputes among and between the separate branches

---

[6] No less than Oliver Wendell Holmes described him in these terms: "If American law were to be represented by a single figure, skeptic and worshipper alike would agree that the figure would be one alone, and that one would be John Marshall." OLIVER WENDELL HOLMES, THE MIND & FAITH OF JUSTICE HOLMES 385 (Lerner ed., 1943).

[7] 5 U.S. 137 (1803).

[8] *See id.* at 180.

of government.[9] To Marshall, the Constitution meant this to be the Supreme Court of the United States.[10]

The articulation of such a principle would not raise an eyebrow today; in 1803, however, it brought on a firestorm of criticism. No less than President Thomas Jefferson led the attack. In a letter to Spenser Roane, Chief Judge of the Virginia Court of Common Appeals, Jefferson described Marshall's opinion in *Marbury*:

> [The Constitution] has given, according to this opinion, to one of them alone the right to prescribe rules for the government of the others; and to that one too which is unelected by, and independent of, the nation, for experience has already shewn that the impeachment it has provided is not even a scare crow. . . . The Constitution, on this hypothesis is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they may please.[11]

Perhaps emboldened by Mr. Jefferson's prose and more likely fueled by a deep personal animus towards Marshall,[12] Roane proceeded to write a series of letters—under the pen name of "Hampden"—to the editor of a local newspaper. The letters bitterly criticized the decisions of the Marshall Court and announced that, at least as to one of them which had come from Roane's own court, the state of Virginia would refuse to honor or abide by it![13]

Marshall's response to his critics is interesting. Eschewing the kind of caution Judge Calabresi suggests today, Marshall chose to write his own series of letters to the editor of another local newspaper under the pen

---

[9] *See id.* at 177–78.

[10] *See id.* at 180.

[11] BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 53 (Oxford Univ. Press 1993) (citing THOMAS JEFFERSON 10, THE WRITINGS OF THOMAS JEFFERSON 140 (Ford ed., 1899)).

[12] In one of the great "what ifs" of history, Roane, an ardent state's rights advocate and head of the Republican Party in Virginia, had been promised the Chief Justice's position by then President-elect and fellow Virginian Thomas Jefferson. To the surprise of many, Chief Justice Oliver Ellsworth stepped down early enough to permit lame-duck President John Adams the opportunity to nominate his successor. After offering the job to at least one other person (John Jay), Adams settled on his Secretary of State, John Marshall. Marshall and Roane had been longtime political rivals in Virginia. *See* SCHWARTZ, *supra* note 11, at 53.

[13] In *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), the Supreme Court had held that the treaty formalizing the cessation of Revolutionary War hostilities controlled in a conflict with a Virginia state statute escheating the property of British sympathizers. *See id.* at 362. The decision represents the first time that the Supreme Court articulated its constitutional authority to overturn a state court decision.

name of "A Friend of the Constitution." Defending his view of the proper role of the Supreme Court, Marshall denounced his critics. These critics, Marshall argued, would render the Constitution totally ineffective by proceeding to

> pluck from it power after power in detail, or may sweep off the whole at once by declaring that it shall execute its acknowledged powers by those scanty and inconvenient means only which the states shall prescribe. . . . [The national government] would then 'become an inanimate corpse, incapable of effecting,' the objects for which it was created."[14]

Thomas Jefferson was not the only President that Marshall's opinions would offend. Upon learning of Marshall's opinion in *Worcester v. Georgia*,[15] which held that the Constitution gives Congress the exclusive power to regulate commerce within the exterior boundaries of the Cherokee Indian Nation,[16] President Andrew Jackson is reported to have uttered what is probably history's best known judicial criticism: "John Marshall has made his decision:—*now let him enforce it*!"[17]

III. THE TANEY COURT AND *DRED SCOTT*

The Supreme Court's decision in *Dred Scott v. Sanford*,[18] occurring on the cusp of the Civil War, is one of those watershed cases, impacting not only the Court, but the entire nation. Unlike *Lochner v. New York*,[19] whose importance was only fully understood some years after its rather uneventful announcement, *Dred Scott* was of immediate and incendiary stuff. Written about and widely anticipated, the case generated significant newspaper publicity even before it was decided.

The precise issue before the Court was the authority of Congress to regulate slavery in the Western Territories.[20] The issue came to the Court at a pivotal time in the slavery-abolitionist debate. The Southern states were concerned that the admission of new "free" states might mean the

---

[14] GERALD GUNTHER, JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 93, 99 (Stanford Univ. Press 1969). Students of history are indebted to Professor Gerald Gunther for his detailed study of the Marshall response to the Roane letters.

[15] 31 U.S. 515 (1832).

[16] *See id.* at 562-63.

[17] ALBERT J. BEVERIDGE, 4 THE LIFE OF JOHN MARSHALL 551 (Houghton Mifflin 1919) (citing Horace Greeley, 1 THE AMERICAN CONFLICT 106 (1865)).

[18] 60 U.S. 393 (1857).

[19] 198 U.S. 45 (1905).

[20] *See Dred Scott*, 60 U.S. at 403.

loss of sufficient political power, especially in the United States Senate, so that the institution of slavery itself would be threatened. For their part, Northern abolitionists were equally concerned that slavery might spread from the Deep South to the new lands. That at least five of the nine members of the Supreme Court were present or former slaveowners added to the concern about the case. Horace Greeley, writing in the *New York Tribune*, opined that settlement of this critical issue by a Court dominated by slaveholders doomed the issue from the beginning: "I would rather trust a dog with my dinner."[21]

When the decision finally came down in March of 1857, the abolitionist reaction to its holdings—that Congress had no authority under the Constitution to regulate slavery in the territories and that Blacks, even "free" Blacks, were not citizens under the Constitution[22]—was furious. Prior to *Dred Scott*, Roger Brooke Taney of Maryland had been universally acclaimed as second only to Marshall in importance and impact. After he read the Court's decision in *Dred Scott* from the bench, the Chief Justice was roundly denounced. Senator Charles Sumner of Massachusetts, who would, following the Civil War, help secure passage of the Fourteenth Amendment, declared: "The name of Taney is to be hooted down the halls of history. . . . [F]or 25 years, he administered justice. He administered justice, at last, wickedly, and degraded the Judiciary of the country and degraded the Age."[23] A pamphlet published shortly after Taney's death entitled *The Unjust Judge* spared no effort to pillory Taney and closed with the condemnation that: "[A]s a jurist, or more strictly speaking as a Judge, . . . he was, next to Pontius Pilate, perhaps the worst thing that ever occupied the seat of judgment among men."[24]

IV. JUSTICE FIELD AND THE "SCORNED SPOUSE"

Criticism of judges and disagreement with their decisions may come from sources other than politicians and executive branch office holders. Sometimes it comes from other judges and, even more rarely, may result in more than talk.

In 1863, Congress authorized a tenth seat for the Supreme Court, and President Lincoln named Stephen J. Field, then sitting as the Chief Justice

---

[21] *See* SCHWARTZ, *supra* note 11, at 114.

[22] *See Dred Scott*, 60 U.S. at 454.

[23] SCHWARTZ, *supra* note 11, at 105 (citing CONG.. GLOBE, 38d Cong., 2d Sess. 1013 (1864)).

[24] *Id.*

of the California Supreme Court. Field was one of the most colorful members ever to serve on the Court. He had two equally well-known brothers: David Dudley Field, who led the code codification movement of that era and Cyrus W. Field, who had supervised the laying of the Trans-Atlantic Cable. As a frontier lawyer during the Gold Rush, Field often carried a sidearm and a Bowie knife. During this period, a quarrel with a judge led to a duel, a jail term and Field's disbarment.[25]

Field survived this episode, was readmitted to the practice of law, and became a member of the California Supreme Court. When Field arrived at that Court in 1857, its Chief Justice was David S. Terry of Fresno. Although its precise source and reason are not widely known, a long and simmering dispute would occupy Field and Terry for years to come.

After Field was appointed to the Supreme Court of the United States, he sat as a Circuit Judge on a California case involving Terry's wife.[26] When the decision was read by Justice Field in open court, Terry and his wife stood up and loudly denounced the result. A melee then ensued in which Terry attempted to draw a knife he was carrying, struggled with the courtroom marshals, and knocked a tooth out of the mouth of one of the deputy marshals.[27] Terry was later convicted of assault and, while being transported to jail, announced that: "[the] earth was not large enough to keep him from finding Judge Field and horsewhipping him."[28] In response to these threats, Justice Field was provided with constant protection.

The decision to protect Justice Field proved wise. In early morning hours of August 14, 1889, David Terry and his wife slipped on a train returning Justice Field to San Francisco from circuit duties in Los Angeles. When the train stopped for breakfast, Terry walked up behind Field and started striking the Justice on the side of his face. David Neagle, a Deputy U.S. Marshall assigned to protect Justice Field, and who had been present during the earlier courtroom altercation, warned Terry to stop. When Terry refused and instead reached in his vest (presumably for his knife), Neagle fired two shots, mortally wounding Field's assailant.[29]

---

[25] *See* SCHWARTZ, *supra* note 11, at 151.

[26] *See* Cunningham v. Neagle, 135 U.S. 1, 42-43 (1889). Terry's wife was accused of having forged a marriage certificate reflecting an earlier marriage on her part. *See id.*

[27] *See id.* at 45-46.

[28] *Id.* at 46.

[29] *See id.* at 52-53. San Jouquin County officials charged Neagle with murder, but, on his habeas corpus petition to the Supreme Court, the killing was ruled justified. *See id.* at 53-54.

V. JUSTICE HOLMES AND THE TRUSTBUSTERS

At 43, Theodore Roosevelt was the youngest President in our history. Succeeding to office upon the assassination of President William McKinley, he was also an aggressive opponent of corporate monopolies and an early and enthusiastic supporter of the Sherman (Antitrust) Act. Just prior to Roosevelt taking office, a small group of financiers led by J.P. Morgan had taken control of the entire rail system of the Northwest, consolidating in one company—the Northern Securities Company—all freight and passenger transportation from Chicago to Seattle.[30]

Roosevelt saw Northern Securities as a prime target for antitrust enforcement and his Attorney General Philander Knox filed suit in U.S. District Court in Minnesota on February 19, 1902. The case quickly found its way to the Supreme Court and was argued in front of a packed courtroom on December 14, 1903.[31] Throughout the Winter of 1903 and early Spring of 1904, the *Northern Securities* decision was one of the most eagerly anticipated in years. Commentators felt that corporate America could reliably count on three votes to narrowly construe the Sherman Act (Chief Justice Melville W. Fuller, Justice Edward D. White, and Justice Rufus W. Peckham). Justice John Marshall Harlan, who had earlier dissented in the *Sugar Trust* cases, was felt to be a vote for a broad reading of the Sherman Act.

Although the rest of the Court was considered somewhat uncertain, the Roosevelt Administration felt it could count on the votes of its two appointees, Oliver Wendell Holmes and William R. Day. Teddy Roosevelt would not be the first or the last President to be bitterly disappointed by his own appointee to the high court. When the decision was announced on March 14, 1904, although a narrow 5-4 majority upheld enforcement against the rail trust, Justice Holmes dissented, raising hard questions about the breadth of this powerful statute.[32]

Teddy Roosevelt's reaction is described by a Holmes biographer:

> The President himself heard the news while engaged in a conference, which he interrupted to express his satisfaction in the Supreme Court's decision. He was, however, furious with the behavior of his first appointee to the Supreme Court, whose record he had so thoroughly explored and who had betrayed him. Roosevelt, who was said not to 'care a damn about law,' looked at Holmes as if he were a ward heeler who

---

[30] *See* Northern Securities Co. v. United States, 193 U.S. 197, 320 (1904).

[31] *See id.* at 197.

[32] *See id.* at 364 (White, J., dissenting) (dissenting opinion joined by Fuller, C.J., Peckham, J., and Holmes, J.).

'didn't deliver the goods.' Publicly Roosevelt complained that he could 'carve out of a banana a judge with more backbone than that.' Holmes, the President told Knox, 'will never enter the door of the White House again.'[33]

VI. RACEBAITERS AND THE CIVIL RIGHTS ERA

For sheer vituperative language, it would be hard to match the period following the Supreme Court's decision in *Brown v. Board of Education*.[34] From archival records, we now know that some of the Justices, Justice Jackson for example, were concerned about the pressures that the implementation of integration in the Deep South might have on federal judges.[35]

Justice Jackson and his colleagues surely understood that their decision would be unpopular in some quarters, but it is unlikely that they could have known of the firestorm that awaited those who tried to implement *Brown* and its overruling of the "separate-but-equal" theories of *Plessy v. Ferguson*.[36]

Before it was over, large sections of the nation were dotted with "Impeach Earl Warren" billboards.[37] J. Skelly Wright, a highly respected jurist, was virtually run out of New Orleans by critics of integration. Crosses were burned on the lawns of the homes of federal judges. Resistance to public school integration became a sure fire ticket to southern electoral success. No words were considered too extreme in the vilification of federal judges doing nothing more than enforcing the law of the land. Governor George C. Wallace of Alabama who knew no equal in this regard, referring to his law school classmate Frank Johnson, called what

---

[33] LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE & TIMES OF OLIVER WENDELL HOLMES 405 (Harper Collins 1991).

[34] 347 U.S. 483 (1954).

[35] *See* Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 66 (1994). Professor Klarman of the University of Virginia unearthed from the archives of the Library of Congress, a memorandum by Justice Jackson dated March 15, 1954—after the first argument of *Brown* in 1952, but before the second in the October 1954 Term. *See id.*

[36] 163 U.S. 537, 551-52 (1896).

[37] *Brown* was argued on the merits twice. First in 1952, when the Court was headed by Chief Justice Fred Vinson, a poker-playing buddy of President Harry Truman and a social conservative. The case was reargued in the October 1954 Term. In the interim, Chief Justice Vinson died and Earl Warren, former Governor of California and running mate of Thomas Dewey in 1948, was appointed to take his place.

many would agree is one of the finest federal judges to have served his country a "low-down, carpetbaggin', scalawaggin', race-mixin' liar."[38]

VII. CONCLUSION

Most federal judges follow the Calabresi admonition and do nothing when confronted with criticism, believing, as he suggests, that silence and restraint are a fair bargain for life tenure. But criticism may take many different forms. It may be as simple as a statement of respectful disagreement with a particular decision. Abraham Lincoln's comments on the *Dred Scott* decision during his debates with Stephen A. Douglas provide a good example. There is little question but that Lincoln thought the decision fundamentally wrongheaded. It also had enraged the Northern abolitionist press whose support was critical to the new Republican Party. Yet Lincoln's comments are the very model of restraint: "We think that the *Dred Scott* decision is erroneous. We know that the Court that made it has often overruled its own decisions, and we shall do what we can to overrule this. We offer no resistance to it."[39] There is no historical record of a response from the Taney Court to these comments and properly so.

Still other criticism may attack the entire underlying premise and rationale for a decision, suggesting that it represents a profound departure from accepted norms and urging defiance. The Spenser Roane critique of the Marshall Court may be the best example of this. Today, we might expect the organized bar or academia to provide the response that Chief Justice Marshall felt compelled to make in his day.

It is difficult neatly to fit the Judge Baer episode in either of these two categories, especially given the suggestions of resignation or impeachment. This form of criticism, going to the heart of an independent judiciary, does merit a resolute but dignified response of the type delivered by the Judges of the Second Circuit.

There are, of course, judges who do not turn the other cheek. Some state court judges, who thrive in an environment in which criticism is an understood and accepted part of the job, fire right back when they receive criticism they believe may be unjustified.

Consider Judge Burton B. Roberts, the Chief Administrative Judge of the Bronx Courts of New York. Judge Roberts, a former prosecutor and reportedly the inspiration for a popular novel about a fictional criminal

---

[38] Klarman, *supra* note 35, at 126.

[39] DAVID HERBERT DONALD, LINCOLN 201 (Simon & Schuster 1995).

case set in New York,[40] recently authorized bail for a defendant in a high-profile criminal case. The defendant had been charged with negligent homicide, arising out of the unfortunate death of a police officer responding to a domestic dispute call. The defendant had struggled with the officer, who slipped and was severely cut when he fell on some broken glass.[41]

Governor George Pataki of New York and Mayor Rudy Guliani of New York City, no strangers to public comment, stepped quickly forward to publicly denounce the judge's bail decision. "[This] is a classic case of a judge not living in the real world," said the Governor. "[I]diotic," said the Mayor, adding that most people would react to the ruling by asking: "What are you doing, Judge? What are you doing?"[42]

The Mayor and the Governor may have been used to dealing with judges who grin and bear criticism. Judge Roberts is not, apparently, one of those judges. His public response was quick and to the point: "The judiciary acts as a ballast on our ship of state, and it prevents the ship from being wrecked on the reefs of inappropriate judgment, and should not be steered by the whims of public officials who possibly are seeking political advantage."[43]

The press, of course, loves a good verbal conflict. They took Judge Roberts's statement directly to the Mayor, who responded as follows: "He's independent, I'm independent. I think he's dead wrong, and I think he's jeopardizing the safety of the city."[44] Judge Roberts was not through. Told of the Mayor's response, he bristled back: "It was not incumbent upon me to poll public officials to interpret the law for me."[45] I suspect some judges, upon learning of this exchange, let out a silent cheer for the likes of Judge Roberts—a reaction not unlike watching a movie about someone who bards the neighborhood bully.

Judge Calabresi undoubtedly has it right for the large majority of criticism that comes a judge's way. Most such criticism simply does not deserve the dignity of a response. This may be particularly true for those who enjoy Article III protection. Judge Calabresi uses his own historical example, an epilogue to the Justice Holmes-Teddy Roosevelt story—which may demonstrate that it may not be what you say in response to criticism,

---

[40] *See* TOM WOLFE, THE BONFIRE OF THE VANITIES (Farrar, Straus & Giroux 1987).

[41] *See* Hoffman, *supra* note 4, at A16.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

but when you say it. Judge Calabresi recounts that during his interview of Holmes in 1902 President Roosevelt sought Holmes's assurance that he would support vigorous enforcement of the Sherman Act. Holmes apparently gave the young President the best assurance he could without committing himself to a particular result. When Roosevelt spotted Holmes at a Washington social event a few days after the *Northern Securities* decision was announced, Roosevelt is reported to have shouted across the room: "Holmes, you son of a bitch!" To which Holmes is reported to have responded: "And *now*, Mr. President, you can go straight to hell."[46]

We certainly have not seen the end of criticism of judges. Robust free speech, even of the coarse and inaccurate variety, may simply be one of the prices of a free society.[47] Today's judges may draw some relief from the knowledge that modern critics are normally not as colorful or as sharp of tongue as Horace Greeley or Teddy Roosevelt, as nasty as George Wallace, or as violent and aggressive as David Terry.

In the end, while judges may not like what they hear and may be sorely tempted to respond to their critics, history does seem to teach us that our predecessors endured far worse, and both they and the Republic seem to have survived.[48]

---

[46] Calabresi, *supra* note 5.

[47] *See, e.g.*, Standing Comm. on Discipline of the United States Dist. Court v. Yagman, 55 F.3d 1430, 1441 (9th Cir. 1995) (lawyer who refers to a federal judge as "ignorant," "ill-tempered," "a buffoon," "a bully," and "a right wing fanatic" is protected by First Amendment).

[48] In recounting these sometimes humorous examples of criticism, I do not mean to forget for a moment that there are unfortunate examples where criticism has crossed the line and resulted in the tragic murder of judges.